

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1971

Cir. Ct. No. 2004CV1799

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DAVID J. GEHL AND DSG EVERGREEN F.L.P.,

PLAINTIFFS-APPELLANTS,

V.

**TOWN OF PERRY, PAT DOWNING, LARRY PRICE,
DAN KELLER, IN THEIR CAPACITIES AS SUPERVISORS,
TOWN OF PERRY, AND MARY L. PRICE, IN HER CAPACITY
AS CLERK, TOWN OF PERRY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. David Gehl and DSG Evergreen (collectively, Gehl) appeal an order denying their petition for a writ of mandamus to compel

Town of Perry officials to approve and issue a building permit. Gehl contends the town officials had a plain legal duty to issue the permit upon receiving his application and fee. We disagree and affirm.

BACKGROUND

¶2 Although the history of this case is long and complex, the parties do not dispute the following background facts outlined by the trial court. Gehl owned and farmed about 225 acres of land in the Town of Perry through a family limited partnership called DSG Evergreen. In 2000, he purchased an adjacent twenty-two acre parcel. Gehl applied for a permit to build an agricultural accessory building on the additional parcel. The town board denied the application in December 2000. On March 29, 2001, Gehl filed a site plan and applications for building and driveway permits to construct a residence on the parcel. The board denied those applications on April 25, 2001. Gehl then sought mandamus relief from those decisions (among other remedies), which the trial court orally denied on July 10, 2002, concluding that the board's actions were discretionary.

¶3 Meanwhile, the town enacted a historic preservation ordinance in June 2001, authorizing the town board to designate certain properties or structures as historic and to take certain actions to protect such designated places. On August 7, 2001, Gehl filed another application for a permit to build an agricultural accessory building on the twenty-two acre parcel. On December 11, 2001, the town designated an old log church near Gehl's property to be a historic building, and it placed about one-half of Gehl's twenty-two acre parcel within the surrounding preservation district subject to the ordinance provisions. Gehl amended his ongoing action to challenge the creation of the historic district.

¶4 Following the adoption of the preservation plan relating to the log church, the town asked Gehl where on the parcel he proposed to put the agricultural accessory building. Gehl took the position that he was not required to disclose the location under the ordinances in effect at the time he filed his application, and he did not provide the requested information. Consequently, the town has not acted on the August 7, 2001 application. Gehl filed the present, separate action in June 2004 seeking a writ of mandamus to compel the respondent town officials “to approve” and “to issue” a building permit for an agricultural accessory building. The circuit court entered a written order on June 22, 2005, denying the requested relief.

DISCUSSION

¶5 A writ of mandamus is a mechanism by which a court may compel a public official to perform a certain act. *State ex rel. Oman v. Hunkins*, 120 Wis. 2d 86, 88, 352 N.W.2d 220 (Ct. App. 1984). Mandamus is an extraordinary legal remedy that is available only in limited circumstances—namely when an official has clearly violated a plain legal duty and the party seeking relief has no other adequate remedy at law. *State ex rel. Collins v. American Family Mut. Ins. Co.*, 153 Wis. 2d 477, 483, 451 N.W.2d 429 (1990); *State ex rel. Dressler v. Circuit Court for Racine County*, 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991). Mandamus cannot be used to compel the manner in which an official exercises discretion. *Labor and Farm Party v. Elections Bd., State of Wisconsin*, 117 Wis. 2d 351, 358, 344 N.W.2d 177 (1984).

¶6 We first note that we do not address the parties’ arguments concerning whether the town board had a duty to *act* on Gehl’s application before receiving the requested information as to the location of the proposed building.

That is not the relief Gehl seeks in his petition for a writ of mandamus. Rather, as we have described above, the petition asks for an order compelling officials to *approve* and *issue* Gehl a building permit.

¶7 For purposes of our analysis, we assume without deciding that the provisions of the town’s historic preservation ordinance did not apply to the parcel in August 2001 when Gehl filed his present permit application, and further that the town could not then require Gehl to provide information regarding the proposed location of his accessory building. Even making these assumptions in Gehl’s favor, we conclude that the town officials did not have a ministerial duty to approve and issue a building permit to Gehl.

¶8 The town’s building code provides that the town clerk shall issue a building permit “only if all of [a list of specified] conditions are satisfied *as determined by the discretion of the Town Board.*” TOWN OF PERRY BUILDING ORDINANCE § 1.06 (2000) (emphasis added). The conditions for the board to consider include compliance with the goals, standards and policies of the town’s Land Use Plan; compliance with applicable local and state building codes; adequate sanitation during the construction process; avoidance of any public nuisance; and appropriate measures to prevent trespassing, littering, discharging of waste or nuisances on adjacent land. *Id.* Contrary to Gehl’s assertions, we find nothing in the ordinance that limits the application of § 1.06 to only those proposed structures for which a site plan must be submitted.¹ We are satisfied

¹ TOWN OF PERRY BUILDING ORDINANCE § 1.07(1) (2000) provides that “Building Permits for ag accessory buildings do not require a Site Plan Approval or any of the other supporting documents listed in sec. 1.05(5) o[f] this Ordinance.” Section 1.05(5) of the ordinance lists documents (e.g., county zoning and sanitary permits, land division and/or site plan approvals) that, “if required,” must be submitted to the town clerk after a permit application is approved by the town board but before a building permit is issued by the clerk. Nothing in

(continued)

that, under the plain language of the ordinance, the approval of an application for a building permit is a discretionary action of the town board, not a ministerial act for which mandamus would lie.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

sections 1.05(5) or 1.07, however, suggests that the town board must approve a building permit application for an “ag accessory building” without first exercising its discretion as directed under section 1.06 of the ordinance.

